BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MELVIN RAY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,057,893
GOODYEAR TIRE & RUBBER CO.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the February 8, 2012 preliminary hearing Order entered by Special Administrative Law Judge Jerry Shelor.

The Special Administrative Law Judge (SALJ) ordered that temporary total disability (TTD) be paid at a rate of $555.00 per week for the period from September 12, 2011 until claimant is released to return to work, and has been offered accommodated work within temporary restrictions, has attained maximum medical improvement, or further order of the Court.

Respondent argues that claimant failed to sustain his burden of proof that he suffered an accident on the job on April 1, 2011, and didn't establish that he timely reported a repetitive use claim, therefore the SALJ's Order should be reversed.

Claimant argues that the Order should be affirmed.

ISSUES

1. Whether claimant's alleged accidental injury arose out of and in the course of his employment;

2. The date of accident or injury, notice, timely written claim and the prevailing factors as to claimant's injury;

3. Did claimant satisfy his burden that he suffered an injury as the result of repetitive trauma which arose out of and in the course of his employment? If so, is claimant entitled to temporary total disability compensation (TTD)?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed and claimant denied compensation in this matter.

Claimant's position with respondent is as a Banberry trucker. He has held this title for the last 25 years and has worked for respondent for 41 years.

Claimant testified that he began to have problems with his left shoulder in late March or early April 2011. Claimant did not report the problem and continued to work until June 13, 2011, when he went to see his family physician, Dr. Mark Thomas, for a "quick fix". X-rays were taken and an appointment was made for six weeks later for claimant to see Dr. Bradley T. Poole. While claimant waited for his appointment with Dr. Poole his shoulder problems continued to get worse, which claimant believed was due to his job with respondent.

Claimant testified that he knew his shoulder problems were related to his work in April 2011, but he had no way to prove it. Also, Dr. Thomas told him it was probably nothing and not worry about it, so claimant did nothing. At the preliminary hearing claimant testified as follows:

> Q. And what was your problem you were complaining of Doctor Thomas or complaining to Doctor Thomas about?
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> A. I told him I wasn't sleeping at night because my shoulder was bothering me and he said probably wasn't nothing, nothing to worry about.
>
> Q. Did you tell him it bothered you at work?
>
> A. Yeah. Yeah, I did, but he said, you know, it probably wasn't nothing to worry about so.
>
> Q. And you didn't report --
>
> A. I didn't.
>
> Q. You didn't report that to Goodyear?
>
> A. No, I didn't because I didn't -- I couldn't say I injured it or nothing. I just, you know.

> Q. Okay. And, and you felt like your work was hurting your shoulder; would that be fair?
>
> A. After, after I seen Doctor Thomas and it got worse, and then I knew that it was work related but I couldn't prove it, so I didn't turn it in.[1]

When claimant met with Dr. Poole on July 20, 2011, he was given the option of an injection or an MRI to see what was going on. Claimant chose the MRI (taken August 20, 2011), which revealed a torn rotator cuff. Surgery was recommended to repair the tear. The procedure was performed on September 12, 2011. Claimant continued to work up to the day of the surgery with no restrictions. Claimant has not worked since his surgery.

It wasn't until claimant met with Dr. Poole that he decided to file for workers compensation benefits.[2] This was the result of a verbal conversation, nothing was provided in writing at that time.

On September 20, 2011, claimant provided respondent with written notice of his shoulder problems that he felt were work-related and his desire or intent to file a workers compensation claim. At that time respondent had claimant complete an Associate Report of Incident which indicated a date of incident on April 1, 2011. Claimant testified that he never told the nurse that he was injured on April 1, 2011, and that it was just a date the nurse had him put on the paperwork.[3] However, claimant acknowledged that he provided the nurse with a March/April start date for his shoulder pain. That time frame was when claimant believed his injury began.

Claimant had a previous workers compensation injury in 2009 and had a knee replacement. Therefore he is familiar with process of reporting an injury and filling out an accident report.[4]

Claimant testified that he has not gone back to work since the surgery because he is not able to pass the required physical, which involves lifting 80 pounds from the floor to a four foot shelf twice. Respondent has been unable to provide claimant with any accommodated work. Claimant testified that he has shown improvement since the surgery and hopes to soon be able to pass the physical and get back to work.

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[1] P.H. Trans. at 21-22.

[2] *Id.* at 8.

[3] *Id.* at 10.

[4] *Id.* at 18.

The surgical reports from Dr. Poole on September 12, 2011, are part of the record. However, none of the prior medical reports from Dr. Poole's earlier July 20, 2011, exam and Dr. Thomas' June 13, 2011, exam are included.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

K.S.A. 2011 Supp. 44-508(e) states:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
>
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
>
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
>
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
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> In no case shall the date of accident be later than the last date worked.

The SALJ granted claimant benefits in this matter, but failed, in the order, to identify whether claimant suffered an accident or repeat trauma, failed to determine a date of

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[5] K.S.A. 2011 Supp. 501b and K.S.A. 2011 Supp. 44-508(h).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

accident or injury under the recently revised Workers Compensation Act (Act), and failed to determine whether claimant provided timely notice or written claim in this matter.

The only causation opinion contained in this record comes from Dr. Poole. In his letter of January 12, 2012, to claimant's attorney, he stated:

> Given causation, at this stage, repetitive use injuries do contribute to cuff deficiencies in his demographics. This is certainly compatible with him using his shoulder with repetitive use overhead activity for upwards of 25 years.[7]

The medical evidence from Dr. Poole, coupled with claimant's testimony regarding how and when the shoulder problems began, convinces this Board Member that claimant suffered personal injury through a series of repetitive trauma's which arose out of and in the course of his employment with respondent, and the physical requirements of claimant's job with respondent were the prevailing factor in causing claimant's injuries.

Respondent also contends that claimant failed to provide timely notice of his repetitive traumas. In order to determine the timeliness of the notice, a proper date of injury must first be decided. Here, claimant was neither taken off work, nor placed on modified or restricted duty. Also, claimant continues to be employed by respondent. Therefore, the only possible date of injury remaining under K.S.A. 2011 Supp. 44-508(e) involves when claimant was advised by a physician that the condition was work-related. This record does not support a finding that claimant was advised by Dr. Thomas of a work-related series of injuries during the June examination. Additionally, when claimant met with Dr. Poole on July 20, 2011, they discussed the proper course of action with claimant being given the option to receive an injection in the shoulder or undergo an MRI to "see what's wrong with this thing".[8] However, claimant did not testify regarding a "causation" conversation at that time.

Approximately one week later claimant was advised that he needed surgery on the shoulder because he had a "torn cup".[9] Claimant didn't say if Dr. Poole told him, at that time, whether this injury was work-related. Claimant testified that ultimately, he did ask Dr. Poole if this problem was work-related and Dr. Poole agreed. That conversation took place the week before claimant's September 12, 2011, surgery.[10] Therefore, under K.S.A. 2011 Supp. 44-508(e), the date of injury in this matter would have occurred during the week before claimant's surgery on September 12, 2011. While the exact date of injury cannot

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[7] P.H. Trans., Cl. Ex. 1 at 1 (Dr. Poole's Jan. 12, 2012 letter).

[8] *Id.* at 7.

[9] *Id.*

[10] *Id.* at 8.

be determined, whether notice was timely provided, within the parameters of K.S.A. 2011 Supp. 44-520, can be determined.

K.S.A. 2011 Supp. 44-520(a)(1) states:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
>
> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
>
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.

This Board Member finds that claimant failed to provide timely notice of his repetitive trauma injuries immediately prior to the surgery on his left shoulder. It appears that claimant had determined that he was suffering from work-related shoulder problems shortly after meeting with Dr. Thomas in June. He then proceeded to the examination with Dr. Poole on July 20, 2011, convinced that he was suffering from a work-related injury or injuries. Thus, under K.S.A. 2011 Supp., 44-520(a)(1)(B) notice was required within 20 days of the July 20, 2011 examination with Dr. Poole. Claimant acknowledges that notice was not provided until September 20, 2011. Thus, notice of a repetitive trauma injury was not timely provided.

Respondent listed timely written claim as an issue in this appeal. However, the 2011 Kansas Legislature eliminated K.S.A. 44-520a when it revised the Act. Therefore, under the 2011 version of the Act, timely written claim no longer remains an issue for the Board's consideration for accidents or injuries occurring after May 15, 2011.

For the above reasons, this Board Member finds that the preliminary award of benefits by the SALJ, should be reversed and benefits denied for claimant's failure to provide timely notice of his repetitive trauma injuries.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving that he suffered personal injury by repetitive trauma which arose out of and in the course of his employment with respondent, and that employment is the prevailing factor in causing the injuries. However, claimant failed to provide timely notice of this series of repetitive traumas. Therefore, the award of benefits by the SALJ should be reversed and benefits denied.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Special Administrative Law Judge Jerry Shelor dated February 8, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
johnostrowski@mcwala.com
karennewmann@mcwala.com

John A. Bausch, Attorney for Respondent and its Insurance Carrier
jbausch@goodellstrattonlaw.com

Jerry Shelor, Special Administrative Law Judge
Rebecca Sanders, Administrative Law Judge

[11] K.S.A. 2011 Supp. 44-534a(a)(2).